SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1345 107

INTERNATIONAL SHOE COMPANY, a Corporation,
Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT AND E. B. RILEY, COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT UPON APPELLEES' MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

Table of Authorities Cited

Cases

Statute

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Appellees.

APPELLANT'S BRIEF UPON APPELLEES' MOTION TO DISMISS OR AFFIRM

This is an appeal from the decision and judgment of the Supreme Court of the State of Washington (*International Shoe Company* v. *State of Washington, et al.*, 122 Wash. Dec. 135).

That decision holds that it is not a burden upon interstate commerce, nor a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, to permit the State of Washington to recover, even under the facts presented in this case hereinafter referred to, contributions to the unemployment compensation fund of the State of Washington.

Although appellant is a corporation foreign to the State of Washington, the decision also holds that under the facts

in the case it is not violative of the Fourteenth Amendment to the Constitution of the United States to hold it subject to process of the courts of the State.

Summary of Facts

The facts involved in this case are set out in detail in the Jurisdictional Statement. They are embodied in an agreed Statement of Facts, supplemented by testimony of one witness. As was stated by the lower court in its opinion, the testimony of this witness adds nothing to the agreed Statement of Facts. The facts as set forth in the agreed statement show:

Appellant is a corporation organized under the laws of Delaware, with its principal place of business in St. Louis, Missouri. Its business is the manufacture and sale of shoes. It has no place of business in the State of Washington, maintains no general agent in the State of Washington, makes no contracts of sale or purchase in that State, and maintains no stock of goods and makes no deliveries in intrastate commerce in that State. It employs solicitors to take orders in the State of Washington, these solicitors being residents of that State. All orders taken are subject to approval or rejection only at the home office of the Company outside of the State of Washington. If accepted, orders are filled f.o.b. shipping point outside of the State of Washington. All collections are made outside of the State of Washington. The solicitors have no authority to do anything except exhibit samples and solicit orders. The solicitors sometimes rent sample-rooms and are reimbursed for the expense thereof by the Company. As samples they carry one shoe of a pair, which belongs to the Company. The solicitors are paid upon a commission basis and the commissions amount to about $33,000 a year in the aggregate, in the State of Washington.

The lower court summarized the facts as follows:

"Summing up the facts in the instant case, we find that the salesmen are all residents of the state of Washington, and have definitely defined territory assigned to them. There is no storage or warehousing of goods. The activities of these agents of appellant consist of the solicitation of orders and the display of samples, sometimes in permanent display rooms. Salesmen are required to spend certain time each year in St. Louis for the purpose of receiving direct personal instructions as to their duty, as to the line of shoes which they are to offer to the trade, the method of selling, and information with reference to the construction of new types and kinds of shoes which are to be offered to the trade. Some of the salesmen rent sample rooms in business buildings, and the expense of such rent and maintenance is paid by the salesmen, who are reimbursed on an expense account by appellant. There is a detailed program followed by the company through contact with the salesmen, to keep the company's business at a high level, to eliminate differences arising in the particular territory, and to discuss credit of Washington purchasers and customers with whom the company is doing business. As a result of the activities of these agents, there is a continuous flow of appellant's product into this state by means of interstate carriers. This course of action has been carried on over a period of years, by as many as thirteen salesmen, and the substantial volume of merchandise and the regularity of its shipment are clearly shown by the amount of commissions regularly earned by these resident salesmen."

Jurisdiction to Review Ruling That Appellant Is Amenable to Process in the State of Washington.

Appellees asserted that appellant is liable as an employer for the years 1937 to 1941, inclusive, for contributions to the unemployment compensation fund, under the pro-

visions of the state statute which are set out in the Jurisdictional Statement, and levied an assessment against appellant for contributions for those years.

The state statutes relating to process provide that levy of assessment of such contributions against an employer is made by serving upon the employer a notice of assessment, and, if the employer be a foreign corporation doing business within the State, by delivery of a copy of such notice to any agent, cashier or secretary of the corporation. (These statutes are set out in the Jurisdictional Statement.)

Service in this case was made by serving such a notice upon one of the solicitors.

Appellees have accompanied their Statement in Opposition to Jurisdiction with a motion to dismiss the appeal or to affirm the judgment of the lower court, upon the ground that the questions presented are not substantial.

The questions presented upon this appeal are: Whether appellant was doing business in the State of Washington so as to be amenable to process within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States; whether the levy of the tax constitutes a burden upon interstate commerce within the meaning of Section 8 of Article I of the Constitution of the United States; and whether it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In its decision that appellant is subject to process of the courts of the State of Washington the Supreme Court of that State has extended the rule as laid down by this Court far beyond the limits of any case which has been decided by this Court. No case has been decided by this Court upon facts which show such limited activities in the state of the forum as are present in this case.

The extent of the rule announced by the lower court is shown by the following quotation from the majority opinion:

> "While we are of the opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule."

The court does not point out what these "additional activities" are, and it is submitted that there are none.

So, the decision really holds that solicitation of orders by a foreign corporation, plus nothing more than a resulting continuous flow of goods into a State, constitutes doing business in that State.

Such a rule has never been announced by this Court.

Appellees cite

International Harvester Co. v. *Kentucky*, 234 U. S. 579.

That case does not support appellees because in that case, in addition to solicitation and flow of business into the State of the forum there was authority on the part of the traveling salesmen to receive payment in money, checks and drafts, on behalf of the defendant company, and to take notes payable and collectible in that State. No similar state of facts is present here.

The case of *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79; Ann. Cas. 1918C, 537, also cited by appellees, instead of supporting them supports the contention of appellant in this case. In that case the defendant company, a New Jersey corporation, sent its drummers

into Louisiana to solicit orders for the retail trade, to be turned over to jobbers. These drummers had no authority to make sales, collect money or extend credit for the defendant company. That case points out the distinction between it and the *Harvester* case in the following language:

> "The plaintiff in error relies upon International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 U. S. (L. Ed.) 1479, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, *but there was also authority* upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; *these things, taken together*, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State." (Italics ours.)

That same distinction exists between the case at bar and the *Harvester* case. It is a distinction which the majority opinion of the lower court ignores.

In no case which this Court has decided has there been presented the question of whether solicitation of orders plus only a continuous flow of goods into a State resulting from the solicitation constitutes doing business in the State.

The confusion that exists in other courts as to the interpretation to be given the *Harvester* case is clearly shown by the multitudinous citation of authorities in the majority and dissenting opinions of the lower court in this case.

It is submitted that this case presents a substantial question warranting this Court entertaining jurisdiction to determine the right of the State of Washington to require appellant to submit to its process.

Jurisdiction to Review Ruling That State of Washington Has Right to Levy Unemployment Compensation Contribution

Appellees rely upon the provisions of 26 U. S. C. Sec. 1606.(a), which reads as follows:

> "No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."

as determining that appellant may be required to make contribution to the State of Washington unemployment compensation fund notwithstanding that it is a foreign corporation. In support of their position they cite *Perkins* v. *Pennsylvania*, 314 U. S. 586; 62 S. Ct. 484. However, that case presents no such factual situation as is present here. In the case at bar, appellant conducts no activities in the State of Washington save the solicitation of orders and shipment of goods into the State. The Pennsylvania case involves a natural person whose entire activities were carried on in the State of Pennsylvania. It is true that the case was decided as though he were engaged in interstate commerce, notwithstanding that the lower court pointed out that there was no factual situation presented which indicated that he was engaged in interstate commerce. *Commonwealth* v. *Perkins* 342 Pa. 529; 21 Atl. 2nd 45. The case was decided by this Court in a per curiam opinion.

Appellees also cite *Inter Island Steam Navigation Co. Ltd.* v. *Territory of Hawaii*, 305 U. S. 306. In that case the question involved was the right of the Territory of Hawaii to collect fees for expenses of investigation of utility cor-

porations, of which the Navigation Company was one. That company carried freight by water between different points in the Territory. Some of the freight was destined to foreign ports. Congress, in the exercise of its control over the legislation of territories, had passed a special act validating the Utilities Act of the territorial legislature which provided for the collection of fees to pay for the expenses of investigating corporations. That case can have no bearing on the decision of this case. All of the things done by the Navigation Company were done in the Territory of Hawaii.

Appellees also cite *Standard Dredging Corporation* v. *Murphy et al.*, 319 U. S. 306, 63 S. Ct. 1067, 87 L. Ed. 1017. In that case the employer was held liable for unemployment tax contributions. However, the facts in the case were widely variant from those in this case. In that case, the employer was present in the State of New York; it was engaged in the work of operating vessels in the waters of the State of New York during the entire period for which the tax was demanded. This Court said:

> "The vessels which both employees served were engaged primarily on work in the waters of the State of New York during the tax period."

Moreover, there was not presented to the court in that case the question of whether such a tax violated the commerce or any other clause of the U. S. Constitution, excepting Article 3, Section 2, which gives to the Federal Courts exclusive admiralty jurisdiction. The only other question presented was whether the Acts of Congress had deprived the States of the right to tax maritime employers. In addition, there was no question in that case that the Dredging Company was present in the State with its property.

In the case at bar, as is shown by the facts detailed in the jurisdictional statement and summarized in this brief, appellant carried on no activities in the State of Washing-

ton excepting solicitation of orders, followed by the shipment of goods in filing the orders which were accepted, whereas in the cited cases the contracts of the employer and the work of the employer were completed in the State which demanded the contribution or the fee; also the property of the employer was located in that State. There has been no case decided by this Court which considers the question of whether an employer situated as is appellant here may, without violating the commerce clause of the Constitution be subjected to unemployment compensation tax.

It is submitted that the Federal statute referred to does not contemplate taxation of such a corporation. That statue has in contemplation only a situation such as is presented in the cases cited, namely where the corporation is present in the State, carrying on either interstate or intrastate activities: *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 69 L. Ed. 982.

To permit the State of Washington to levy this tax is also in violation of the due process clause of the Fourteenth Article of the Amendments to the Constitution of the United States.

In the case of *Frick* v. *Commonwealth of Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 66 L. Ed. 1958, this Court said:

> "This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, *it cannot give them any extra-territorial* operation, * * *"
>
> "* * * The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it

imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. *But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law.*" (Italics ours)

In *Cleveland P. & A. R. R. Co.* v. *Commonwealth of Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179, this Court said:

"The power of taxation, however vast in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposes, excises or licenses, it must relate to one of these subjects." (Italics ours)

It is respectfully submitted that this Court has jurisdiction to consider the questions of whether or not appellant is amenable to process of the State of Washington and whether or not it may be required to make contributions to the unemployment compensation fund of the State.

Respectfully submitted,

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